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BOARD OF SUPERVISORS US Fish & Wildlife Service
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COUNTY OF HUMBOLDT

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July 25, 2003

The Honorable William G. Myers, III
Solicitor
Mc 6352-MIB
U.S. Department of the Interior
1849 "C" Street, NW
Washington, D.C. 20240

Re: Humboldt County's Central Valley Project Contract

Dear Solicitor Myers:

The purpose of this letter is to supplement Humboldt County's letters of March 25 to Secretary Norton and May 21 to you regarding the entitlement of Humboldt County to releases of water from the Trinity River Division (TRD) of the Central Valley Project (CVP). Humboldt County's interest is based on the second proviso in section 2 of the Act of August 12, 1955, Public Law 84-386, 69 Stat. 719 (1955 Act), Humboldt County's 1959 contract with the Bureau of Reclamation, and the associated state permits governing operation of the TRD.

It has been almost four months since our initial correspondence with the Department on this matter. Our requests to meet with Department of the Interior officials and receive assurance that the vested property right in our 1959 contract with the Bureau of Reclamation will be honored have gone unanswered. On July 10, 2003 Supervisor Geist attended the *Water 2025 Conference* in Sacramento, California specifically to make a direct request for a meeting with DOI and BOR representatives and staff. We sincerely appreciate that during the conference Mr. Raley directed BOR staff to meet and discuss our 1959 contract and release request.

Specifically, this letter will address whether the 1955 Act may be construed so that the second proviso in section 2 pertaining to Humboldt County is an exception to or limitation on the first proviso in section 2 regarding release of water from the TRD for fishery protection in the Trinity River mainstem. The provisos cannot be so construed. The following analysis is based on the plain meaning of the 1955 Act, the legislative history of that Act, and administrative and judicial construction of the 1955 Act.

On its face, section 2 of the 1955 Act enacts the general authority that the TRD be integrated and coordinated, operationally and financially with the other units of the CVP. That authority is expressly qualified by the introductory phrase "[s]ubject to the provisions of this Act . . ." Note that "provisions" is plural in that phrase. Immediately after the integration authorization, and as part of the same sentence, are two provisions:

Provided That the Secretary is authorized and directed to adopt appropriate measures to insure the preservation and propagation of fish and wildlife, including, but not limited to, the maintenance of the flow of the Trinity River below the diversion point at not less than one hundred and fifty cubic feet per second for the months of July through November . . . unless the Secretary and the California Fish and Game Commission determine and agree that lesser flows would be adequate for maintenance of fish and wildlife and propagation thereof . . . : *Provided further*, That not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users.

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The Supreme Court describes the role of the proviso in legislation as follows:

The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached. Minis v. United States, 15 Pet. 423, 525. Although it is sometimes misused to introduce independent pieces of legislation. Georgia Railroad & Banking Co. v. Smith, 128 U.S. 174 [<javascript:docLink\('USCASE','128+U.S.+174'\)>](#), 181; White v. United States, 191 U.S. 545 [<javascript:docLink\('USCASE','191+U.S.+545'\)>](#), 551.

Cox v. Hart, 260 U.S. 427, 435 (1922).

The "substantive enactment" in section 2 of the 1955 Act authorizes the integration of the TRD into other features of the CVP. The provisos in section 2 constitute specific limitations on the Secretary's discretion to accomplish that integration. See Memorandum opinion from the Solicitor to the Assistant Secretary, Land and Water Resources 3-4 (December 7, 1979) (Attachment 9 to the County's May 21 letter to you).

We understand that your staff has inquired whether the second proviso is an exception, limitation, or some other qualification on the first proviso in section 2 of the 1955 Act. The precedent on statutory construction of provisos compels the conclusion that the second proviso is not, and cannot be, an exception to the first proviso.

Our research reveals no instance in which one statutory proviso has been judicially construed as an exception to another proviso. Nor have we been able to find any case in which Congress itself expressly qualified one proviso by means of another proviso. Rather, the cases uniformly conclude that provisos are "generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause." Wayman v. Southard, 23 U.S. 1, 30 (1825) The object of the two provisos in section 2 of the 1955 Act is to except from the integration authority at the beginning of that section (the "enacting clause") any release of TRD water: (1) for the Trinity River mainstem fishery; or (2) made available to Humboldt County and downstream water users. It is clear then that, notwithstanding anything to the contrary in the enacting clause, the two provisos are exceptions to the integration instruction and that the second proviso is not an exception to the first.

The analysis of the provisos may be pursued from another perspective, as well. As the Court in Cox v. Hart, supra, observed, a proviso is sometimes used to introduce independent pieces of legislation:

It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences.

Id. at 181.

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This approach warrants evaluation in view of what occurred in the legislative process leading to the enactment of the second proviso. By way of background, the House version of the TRD authorization, H.R. 4663, was reported out of the Committee on Interior and Insular Affairs on May 19, 1955. House Report No. 602, 84th Cong., 1st Sess. Section 2, as approved by the Committee contained only the first proviso regarding releases for fish and wildlife. Report No. 602 at 6. Thereafter the bill went to the Rules Committee which issued Report No. 732 on June 7, 1955. The text of the rule is reported at page 7961 of the Congressional Record for June 9, 1955. In the debate pursuant to the rule on H.R. 4663 at page 7962 is the following statement by Congressman Ellsworth:

[w]hen this bill was brought before the Rules Committee there was *also a question regarding the protection of another area of California. . . .*

[I]t is also my understanding that another amendment will be offered by the committee which will probably satisfy the opposition to the bill by another Representative from California. As I understand it, this amendment will be offered *to assure to Humboldt County, Calif., an additional 50,000 acre-feet of water* from the rivers concerned, which should properly take care of the neighboring area.

(Emphasis added) Cong. Rec. House at 7962, June 9, 1955. In the italicized text above, the "other area of California" and "neighboring area" refer to Humboldt County. The addition of the Humboldt County proviso thus occurred in the legislative process after the fishery water provision had been fully considered and approved by the Committee. For this reason as well, the Humboldt County proviso is independent of the first proviso.

In practical terms, the TRD water to be released under the first proviso of the 1955 Act, as further provided for by Congress in section 3406(b)(23) of the Central Valley Project Improvement Act (CVPIA) (Public Law 102-575, Title XXXIV), is primarily for use in the late spring and early summer in the Trinity River mainstem. Humboldt County requires TRD releases, in the parlance of the 1955 Act, to be "made available" in the late summer and early fall in the lower Klamath River. It is physically impossible for TRD water released for fishery restoration purposes in the Trinity River mainstem to be subsequently available in the lower Klamath River in the time frame identified by the scientific reports that Humboldt County is using to guide its decision to call on its TRD water. This is because following its use in the Trinity mainstem, the TRD water flows to the Pacific Ocean in only a matter of days. Thus, water released for Trinity restoration cannot be made "available" to Humboldt County for the lower Klamath fishery within the meaning of the second proviso.

The State of California issued a number of permits associated with the TRD in 1959. State Water Permits under Applications Nos. 5627, 15374, 15376, 16767 and 16768 (September 16, 1959). Condition 9 of the State Permit issued for the TRD states that "Permittee shall release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users." That permit condition governs the conduct of the Bureau's operation of the TRD. The permit condition has been in place since 1959 and, to our knowledge, has never been modified by the Board, or challenged by the Bureau of Reclamation in any administrative or judicial proceeding since it was issued.

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The Bureau of Reclamation did address the second proviso in its appearance before the California Water Rights Board on December 29, 1958, in proceedings that led to the issuance of the permits for the TRD. The Bureau of Reclamation's Mid-Pacific Region has made a copy of the transcript available. A brief summary of the proceeding follows.

The 1958 hearing was called to address, among other things, a protest filed by the California Department of Fish and Game (CDFG). For the purposes of this discussion, the issue before the Board was whether the two provisos of section 2 of the 1955 Act required separate, additive, releases of water from the TRD, as argued by CDFG; or whether the water for the second proviso was subsumed in the first proviso, as argued by the Bureau of Reclamation. At the hearing, the Bureau made it clear that it had negotiated with CDFG an acceptable permit condition for the release of TRD water under the first proviso. However, CDFG did not agree with the Bureau's contention that the amount of water released for the Trinity fishery would be adequate to satisfy as well the quantity for Humboldt County under the second proviso.

The debate then was whether there should be two separate conditions, one for each proviso; or one condition that would subsume the second proviso release in the first proviso release. The Bureau stressed that its plan for the TRD contemplated one condition for both provisos and asserted that two separate conditions would result in an incorrect interpretation of the Bureau's plan for the TRD by making the water for the second proviso additive to the water released under the first proviso. CDFG replied that the Bureau's interpretation would make it unclear whether downstream diverters could cut into fish and wildlife releases. If that is what the Bureau intended, CDFG stated that it would have to strenuously object because all of the TRD fishery releases are needed throughout the entire stretch of the Trinity River. CDFG made it clear that if the releases under the first proviso were cut into for use of water under the second proviso, the effect would be to damage the fishery, a public resource. (Of course, decades of experience with the TRD have demonstrated that far more water than originally negotiated by the Bureau of CDFG in 1958 is needed to implement the first proviso effectively. See December 19, 2003, Record of Decision (ROD).

The Bureau representative stated his understanding that the second proviso was introduced as a floor amendment to the bill after it had cleared the House committee with only the first proviso in it. This is consistent with discussion in the 1955 Act's legislative history, supra. However, contrary to the Bureau's position, this suggests that the TRD release under the second proviso is independent from and additive to, rather than subsumed in, the TRD release under the first proviso.

At the 1958 Board hearing, the Bureau also offered to--but there is no evidence that it ever did--submit evidence to the Board that the tributary inflow below Lewiston would make TRD releases for Humboldt County unnecessary. Significantly, it is well-understood today that tributary inflow is not adequate to supply the water needed to implement the ROD or the water supply identified by the Fish and Wildlife Service earlier this year for the lower Klamath fishery. See Recommendations for Averting Another Adult Salmonid Die-off (March 18, 2003) Prepared by Paul Zedonis, U.S. FWS, et al.

The Board encouraged the Bureau and CDFG to reach an accommodation, but made it clear that the idea of the Bureau simply releasing water any time the Bureau wishes could not constitute compliance with the statutory obligation to make water "available" to Humboldt County and downstream users.

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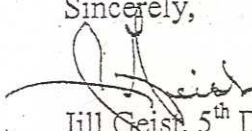
The Humboldt County representative at the hearing stated that the two provisos should be treated independently. He also stated that the second proviso water could be included in the first proviso water, but only until independently needed by Humboldt County. There are two points to be made with regard to that statement. First, the need for the second proviso water separate and apart from the first proviso releases has now been established. Second, the permit condition as ultimately adopted by the Board provides explicitly that the first proviso release does not subsume the second proviso release. In other words, it is the Permit condition, not the statements made by participants at the Board's hearing on the Permit, that governs.

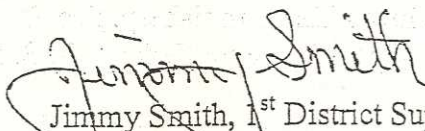
The Bureau persisted with its argument to the Board that the position of CDFG should be disregarded and the permit issued with only one condition for the two provisos. But CDFG continued to object and reiterated that there had been considerable negotiation between the Bureau and CDFG to identify the need for first proviso releases from the TRD. At that point, the Board decided to conclude the hearing. No other hearing was held and the Board eventually issued the two separate permit conditions that remain in effect today. As the Bureau had asserted, the promulgation of two separate conditions had the effect of making the second proviso for 50,000 acre feet additive to the TRD water released under the first proviso.

In summary, the 1958 transcript demonstrates that the Bureau's argument that the County's water was subsumed in the fishery water was just that, an argument. It was looked upon with skepticism by the Board and opposed by Humboldt County and CDFG. Moreover, the permit conditions eventually issued by the Board after the hearing were exactly what the Bureau opposed. The Bureau's argument was appropriately rejected because the Board saw that the Bureau's "plan" for the TRD was inconsistent with the 1955 Act. The state permit conditions comply with the federal statutory directive in the 1955 Act. The Bureau's plan did not. The conditions are otherwise consistent with the Supreme Court's eventual ruling about CVP operations in California v. United States, 438 U.S. 645 (1978); that is, "both the uniform practice of the Bureau of Reclamation and the opinions of the Court clearly supported petitioners' [California's] argument that they may impose any condition not inconsistent with congressional directive." Id. at 676. The Bureau asserts in the 1958 transcript that if the Board does decide to account for the two 1955 Act provisos in separate permit conditions, it would mean that the County's water is *in addition* to the fishery water. That is exactly what the Board did in issuing the two conditions for the two provisos. The Board's action is consistent with the "congressional directive" in the 1955 Act. Moreover, following the 1958 hearing, on June 19, 1959, the Bureau then executed a contract with Humboldt County that implemented the second proviso consistent with County's position. The Board followed that action with the issuance of the TRD permit with separate conditions for each proviso on September 16, 1959.

Thank you for your consideration of this analysis. If you have any questions, please do not hesitate to contact us at (707) 476-2390.

Sincerely,


Jill Geist, 5th District Supervisor
Humboldt County


Jimmy Smith, 1st District Supervisor
Humboldt County of Humboldt

JG/JS/kr